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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 651 (LTS)

5 ALIN HANES CALUGARU,

6 Defendant.

Bail Hearing
(Via Teleconference)

7 -----x
8 New York, N.Y.
9 May 4, 2020
2:31 p.m.

10 Before:

11 HON. LAURA TAYLOR SWAIN,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN
15 United States Attorney for the
16 Southern District of New York
17 SAMUEL P. ROTHSCHILD
18 ROBERT B. SOBELMAN
ELIZABETH A. HANFT
Assistant United States Attorneys

19 JILL R. SHELLOW, ESQ.
20 Attorney for Defendant

21 ALSO PRESENT: MOHAMMED AHMED, U.S. Pretrial Services Officer
22
23
24
25

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(Case called)

THE COURT: Good afternoon. We're here on Mr. Calugaru's application for release pursuant to Title 18 of the United States Code Section 3145(c). Mr. Hanes Calugaru has been detained due to an order of this Court and seeks release on conditions.

Counsel, would you please state your appearances, beginning with the assistant United States attorneys.

MR. ROTHSCHILD: Good afternoon, your Honor. This is Sam Rothschild for the government, and also on the line are assistant United States attorneys Robert Sobelman and Liz Hanft.

THE COURT: Good afternoon, Mr. Rothschild, Mr. Sobelman, and Ms. Hanft.

And counsel for Mr. Hanes Calugaru, Ms. Shellow?

MS. SHELOW: Good afternoon, your Honor. This is Jill Shellow on behalf of Mr. Hanes Calugaru.

THE COURT: Good afternoon, Ms. Shellow.

And is the pretrial services officer on the line as well, Officer Ahmed?

MR. AHMED: Good afternoon, your Honor. Mohammed Ahmed.

THE COURT: Good afternoon.

Is anyone else on the line other than court personnel?

If any members of the press or the public are on the

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1 line, please mute your lines. And counsel, I'd be grateful if
2 you'd mute your lines when you expect to be silent for a period
3 of time.

4 And I remind everyone that neither recording nor any
5 retransmission of the proceeding is permitted.

6 I'll be calling on each speaker during these
7 proceedings. When I do, please identify yourself by name for
8 clarity of the record. And please don't interrupt each other
9 or me during the conference. If we interrupt each other, it's
10 difficult to create an accurate transcript of the proceedings.
11 But having said that, I apologize in advance for breaking this
12 rule, as I may well interrupt counsel if I have questions.

13 I will give each of the attorneys an opportunity to
14 make additional comments or ask questions at the end of the
15 conference, but if anyone has any trouble hearing me or another
16 participant, please say something right away.

17 We are in the midst of the COVID-19 pandemic. I'm
18 conducting this telephonic bail proceeding pursuant to the
19 authority provided by Section 15002 of the CARES Act and the
20 standing orders issued by our Chief Judge pursuant to that Act.
21 Videoconferencing is not reasonably available for today's
22 proceeding.

23 And Mr. Hanes Calugaru is participating in this
24 proceeding only through his counsel today. Ms. Shellow has
25 represented in her application, at Docket Entry No. 239, that

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1 Mr. Hanes Calugaru has consented to have this hearing pursued
2 telephonically in his absence, and I would just ask her at this
3 time to augment the record orally to make clear that Mr. Hanes
4 Calugaru was advised of his relevant rights, the basis of her
5 determination that he has knowingly and voluntarily given up
6 those rights, and whether it would have been feasible to obtain
7 a written confirmation from him of his waiver under the current
8 circumstances.

9 MS. SHELLLOW: This is Jill Shellow.

10 Your Honor, Mr. Hanes Calugaru was advised of his
11 right to participate and his right to participate
12 telephonically. He understands that it is not possible for him
13 to participate physically in person and that we are proceeding
14 over a telephone conference call. He understands what that
15 means. He both knowingly and wilfully gives up his right to
16 participate, waives his right to participate in these
17 proceedings, and this was communicated to me through his
18 parents, who do not speak English, so it came from him to his
19 parents to a translator to me in the first instance, and in the
20 second instance it came to me in an otherwise privileged
21 conversation by email. I can provide the redacted email if
22 your Honor would like an additional supplement to the record.

23 THE COURT: Well, I will take your representation that
24 it is an email that also contains privileged information and I
25 won't require you to file the redacted version. I am taking

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1 that as an indication that without further work, we would not
2 have a cleanly worded specific document from Mr. Hanes
3 Calugaru, and so on the basis of Ms. Shellow's explanation, I
4 find that Mr. Hanes Calugaru has knowingly and voluntarily
5 waived his right to be present for this telephonic hearing and
6 that in the circumstances, it was not reasonably possible to
7 obtain a written waiver document directly from Mr. Hanes
8 Calugaru.

9 As I mentioned earlier, we are here to address the
10 application for release. Mr. Hanes Calugaru has been detained
11 by order of this Court and seeks release on conditions pursuant
12 to Section 3145(c) of Title 18.

13 I have received and reviewed the pretrial services
14 report from the Southern District of Florida and the pretrial
15 services report addendum from the Southern District of New
16 York, which was produced on December 4, 2019. I have also
17 received and reviewed the submission from defense counsel dated
18 April 20, 2020, and the government's submissions dated
19 April 22nd and April 27, 2020.

20 Are there any other written submissions that the
21 parties intend me to have considered in connection with this
22 hearing?

23 MR. ROTHSCHILD: Nothing from the government, your
24 Honor.

25 MS. SHELLLOW: This is Ms. Shellow. Nothing from the

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1 defendant.

2 THE COURT: Mr. Hanes Calugaru seeks release, as I
3 said, pursuant to Section 3145(c), arguing that there are
4 exceptional reasons why his detention is not appropriate. The
5 Court's view is that Section 3145(c) applies only to defendants
6 who are subject to detention pursuant to Title 18 of the United
7 States Code Section 3143(a)(2) or 3143(e)(2). Those
8 subdivisions provide for the detention of defendants who have
9 been found guilty and are either awaiting imposition of a
10 sentence or have been sentenced and have filed an appeal. That
11 is not the situation in which Mr. Hanes Calugaru stands today.
12 Accordingly, the Court believes that Section 3145(c) does not
13 apply and instead the Court intends to construe the motion as
14 it reflects that the Court reopen the bail determination
15 pursuant to Section 3142(f) to find that there are conditions
16 of release that will reasonably assure his appearance as
17 required by this case, taking into account the present COVID-19
18 situation. The Court is also construing the motion to argue,
19 in the alternative, that the same facts constitute a compelling
20 reason for temporary release pursuant to Section 3142(i) of
21 Title 18.

22 Under Section 3142(f), Mr. Hanes Calugaru has the
23 burden of demonstrating that there is new information that has
24 a material bearing on the issue of whether there are conditions
25 of release that will reasonably assure his appearance as

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1 required. Danger to the community was not previously argued by
2 the government, and I do not understand that to be an issue
3 now.

4 Similarly, under Section 3142(i), Mr. Hanes Calugaru
5 has the burden of showing that temporary release is necessary
6 for the compelling reason of his health.

7 And with that, I would invite Ms. Shellow to lead off
8 with her remarks.

9 MS. SHELLLOW: Thank you, your Honor. This is
10 Ms. Shellow.

11 And thank you for construing the motion under
12 Section 3142. That was clearly an error on my part, and your
13 Honor has accurately articulated the statutory provisions that
14 I would have cited had I correctly cited the statute.

15 Our position is that the global pandemic, COVID-19, is
16 in fact new information that was not available at the time that
17 your Honor ruled, and in fact was not available even at the
18 time that the Court of Appeals considered the appeal in this
19 matter. We also take the position that not only does the virus
20 itself but the Bureau of Prisons and specifically MDC's ability
21 to protect Mr. Hanes from the virus is insufficient and puts
22 him at significant risk of both getting the disease and
23 transmitting it to others within the MDC community.

24 I'm not, unless your Honor has questions, going to go
25 into the nature of COVID-19 or why it is new information or why

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1 it is compelling, unless your Honor would like me to do so.

2 I will note that in the alternative to releasing
3 Mr. Hanes Calugaru on terms --

4 THE COURT: Hold on. I heard a beep. Did someone
5 just join us?

6 MR. LEE: Yes. Matthew Russell Lee from Inner City
7 Press.

8 THE COURT: Thank you. Good afternoon.

9 Ms. Shellow, would you continue.

10 MS. SHELLOW: Yes. We would request, in the
11 alternative, that your Honor would consider, under 3142(i), a
12 temporary release on conditions that would expire when the
13 court returns to normal operations or would be reviewable by
14 your Honor at such time. So it is a slight twist to the
15 request for release.

16 I'm going to, if I may, your Honor, address the
17 government's arguments going backward -- that is to say, from
18 its submission on the 22nd. I am not going to address its
19 evidence; I'm not going to address your Honor's previous ruling
20 except to the extent it relates to my argument. Nothing has
21 changed since your Honor's original ruling in that matter.

22 The key to the 3142 argument is in part the ability,
23 or lack of ability, of MDC to care for and manage the prison
24 population and prevent the spread of COVID-19. Your Honor, in
25 *United States v. Smalls*, at 2020 WL 1866034, April 14th of

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1 this year, remarked that BOP measures are calculated to
2 mitigate the risk of infection in its inherently close
3 quarters, for all persons in custody and BOP staff. In certain
4 cases, specific medical conditions may create risks so very
5 substantial that they reduce or outweigh the safety risks posed
6 by temporary release of such detainees.

7 Your Honor, on April 30th of this year, in
8 litigation in the Eastern District of New York, counsel on
9 behalf of inmates who are suing the warden of MDC in *Chunn v.*
10 *Edge*, 20 Civ. 1590, submitted an evaluation of MDC's ability to
11 implement procedures that are consistent with the directives of
12 the Centers for Disease Control. Their declaration, or the
13 declaration of their expert, is approximately 22 pages long,
14 and I do not intend to go into its detail.

15 THE COURT: I'm aware of it.

16 MS. SHELLLOW: Your Honor, you're aware of the
17 declaration?

18 THE COURT: Of the affidavit, yes, I am.

19 MS. SHELLLOW: Of the affidavit. Okay. And I'm going
20 to rely on that analysis of MDC's current ability, or, as the
21 case may be, inability, to both identify patients who are ill
22 with the virus and prevent its spread and provide care and
23 protection to those who are at risk.

24 THE COURT: Ms. Shellow, I have notice provisions for
25 you to make a surreply submission in advance of today's

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1 proceedings. It is now Monday afternoon, the 4th of May. That
2 affidavit or declaration was filed on the 30th of April, and
3 you clearly had time to review and formulate an argument based
4 upon it. Is there a particular reason why you neither notified
5 the Court nor, I would imagine, the government in advance of
6 your intention to rely on this as an additional factual
7 proffer?

8 MS. SHELLLOW: Your Honor, I actually did not become
9 aware of it until after the deadline for filing a reply and was
10 uncertain how I was going to use it. I debated whether to ask
11 for additional time, but having once already done so and in
12 light of the government's response to your Honor that my client
13 is not in a high risk category, I decided that it would be
14 unnecessary. I'm willing to certainly put off today's
15 proceedings. I presume the government has now seen this
16 affidavit or declaration, and if not, I am certainly willing to
17 provide a copy of it.

18 THE COURT: Well, as we will all encounter each other
19 in court on this and other matters going forward, Ms. Shellow,
20 I'll just say that in the future, once you have made a decision
21 to bring in something new that is at least substantial in
22 volume, and I will leave the question of the weight of it in
23 these proceedings until after I have heard the arguments of
24 both counsel and have had the opportunity to reflect on them,
25 but when you do intend to introduce something substantial that

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1 was not raised or discussed in written submissions, I would
2 expect that you would give the Court and opposing counsel some
3 notice whether or not you ask for an adjournment. The deadline
4 had been last Friday at noon, and there's been lots of time
5 between now and then to file something, and so we will go ahead
6 today. I will hear your remarks, I will hear the government's
7 response, and any reply, and if there is a request for an
8 opportunity to make a further submission or for some other
9 adjustment in our schedule, I will certainly consider that.
10 But I still have trouble seeing any proper reason why there was
11 not even some sort of letter or notice dropped on the docket
12 this morning to direct our attention to this material. I read
13 the newspaper this morning so I'm aware of it, but I shouldn't
14 have to assume that anything I read in the newspaper will
15 become the centerpiece of an argument that I'm hearing three
16 hours later, unless counsel has told me that it will.

17 MS. SHELLLOW: I apologize, your Honor, as I should
18 have in fact informed the Court and opposing counsel. I will
19 never make that error again.

20 THE COURT: Thank you. Please go on.

21 MS. SHELLLOW: I believe that that addresses the phases
22 1 through 5 of the BOP's attempt to manage COVID-19 within its
23 facility. The Bureau of Prisons, as I noted in my initial
24 submission, for MDC and MCC, is providing statistics, not only
25 on its website but to Chief Judge Mauskopf in the Eastern

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1 District of New York. The most recent of those was last
2 Thursday. They are published on the court's website. These
3 are the same statistics that were cited in my letter with the
4 URL for the report. As of April 30th, at MDC, Judge Mauskopf
5 was informed that 13 inmates had been tested; six inmates had
6 tested positive. And 32 staff had tested positive. It's for
7 another day, no doubt, that the Bureau of Prisons reports on
8 its own website different statistics. The Bureau of Prisons
9 daily publishes statistics for those facilities where there are
10 reported cases of COVID-19, and it updates them every day, I
11 believe, except Saturday, or except Sunday. The most recent of
12 those says that at the Brooklyn facility, there were two
13 inmates who tested positive, no staff who tested positive, no
14 inmates and no staff who have died from the virus.

15 Judge Rakoff, in the transcript that your Honor was
16 provided by the government, acknowledged that the virus is an
17 exceptional circumstance, and other judges have acknowledged
18 that the rate of growth in the Bureau of Prisons, and in prison
19 facilities generally, of the virus is exponential and that
20 along with residents of nursing homes, residents of
21 correctional facilities, where inmates lack the ability to
22 social distance, as now required, where they lack access to
23 cleaning solutions and soap and gloves and masks, are a petri
24 dish for the spread of the virus.

25 Mr. Hanes appeared, as the government acknowledged, on

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1 the list that the MDC I think in fact provided to Judge McMahon
2 of people who were considered high risk at the beginning of
3 this pandemic. The government represents that MDC counsel said
4 that he isn't on the current high risk list and submitted to
5 your Honor a statement that MDC doesn't share that list. The
6 government, however, failed to address how this list, meaning
7 the second list -- or even the first list, for that matter --
8 were created; that is to say beyond just the general risks for
9 COVID-19 as published by the CDC, there must have been other
10 criteria that were used to develop both the first list and the
11 second list, and it's unclear whether any medical personnel at
12 all were involved in the creation of either list. Unless the
13 government has submitted something *in camera* to your Honor with
14 the list or explaining how the list has come to be, I think it
15 is fair to say that if the Bureau of Prisons, MDC is not going
16 to release information about how it prepared the list and who
17 is on it, that your Honor should view it with significant
18 skepticism. All I am aware of is that Mr. Hanes was on the
19 first list, however that was created, and the government
20 concurs that he was on that list. I don't particularly know
21 what it means. I will tell you that the government, on the
22 same day that it filed its response, also provided me with
23 Mr. Hanes's medical records, which I in fact had received
24 earlier as a result of the subpoena. The medical records do
25 establish that he is what is considered prediabetic and that he

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1 is taking a statin for a high cholesterol count. There is in
2 the medical literature some significant disagreement about the
3 extent to which high cholesterol or prediabetes, for that
4 matter, are impacted by COVID-19. I would submit to your Honor
5 that in the approximately 16 days since your Honor wrote the
6 *Smalls* decision that our knowledge base has grown significantly
7 about the virus and that we can hopefully look forward to
8 significantly more information about both how to manage it as
9 well as what its risk factors are, but that that information is
10 changing daily.

11 The question that I posed generally and that I pose
12 for your Honor is whether your Honor's analysis or --

13 THE COURT: Are you still there?

14 MS. SHELLLOW: Hello? I heard something.

15 THE COURT: Ms. Shellow?

16 MS. SHELLLOW: Yes. Can you hear me?

17 THE COURT: Ms. Shellow?

18 MS. SHELLLOW: Can you hear me?

19 THE COURT: Can anyone hear me?

20 MS. SHELLLOW: I can hear your Honor. I --

21 THE COURT: I seem to have lost the sound on this
22 line. So I am going to text Lisa.

23 THE DEPUTY CLERK: Judge? Hello?

24 MR. ROTHSCHILD: Your Honor, this is Sam Rothschild
25 speaking. Can you hear me?

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1 Jill, for what it's worth, I've been able to hear you
2 the whole time.

3 MS. SHELLLOW: Okay. I can hear you, and I could hear
4 the judge, and --

5 THE COURT: I'm going to call back in now.

6 MS. SHELLLOW: And Lisa -- Lisa, can you hear me?

7 THE DEPUTY CLERK: Yes, I can hear you. Let me lower
8 the mic.

9 She said she'll dial back in, so hopefully she can
10 hear everybody.

11 (Pause)

12 THE COURT: All right. I don't know what AT&T did,
13 but it shut me out of the call, so I apologize for that delay.

14 Ms. Shellow, the last thing I heard you say was: And
15 so this is the question posed for the Court. And then I heard
16 nothing.

17 MS. SHELLLOW: I guess it was a convenient breaking
18 point.

19 The question posed for the Court is whether your
20 Honor's analysis of the risk of flight is altered in the new
21 universe that we are living in. Some courts have observed that
22 flight would be -- I'm going to quote -- "would be enormously
23 more risky and complicated in light of the travel and
24 commercial restrictions brought on by COVID-19." That comes
25 from *United States v. Fellela*, 2020 WL 1457877, from the

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1 District of Connecticut on March 20th, cited by Judge Cott in
2 our district in *United States v. Lopez*, a different Mr. Lopez
3 defendant than the Lopez who appeared before Judge Rakoff and
4 who is the subject of the transcript in Exhibit A of the
5 government's submission. The opinion by Judge Cott is in
6 19 Cr. 116, in which he found that the defendant could be
7 released, and he remarked on how difficult it would be for the
8 defendant to flee in light of COVID-19. I will note for your
9 Honor that Judge Wood, who is the district court judge who was
10 assigned to this Mr. Lopez's case, did reverse Judge Cott, but
11 not on the risk of flight; she reversed him on the risk of
12 dangerousness.

13 In terms of flight, not only is there now COVID-19,
14 but it appears that at least both in this district and in the
15 Southern District of Florida, according to statistics that I
16 obtained literally half an hour before this call and that are
17 available not to the public generally but I believe available
18 through the court's VPN, which is accessible I believe to your
19 Honor and to the government and to the Federal Defenders -- I
20 do not have access to that VPN so I will email your Honor the
21 table that I am reading from -- it's a table of pretrial
22 services violations for the 12 months ending December 31, 2019.
23 In the Southern District of New York, of the 1914 defendants
24 released on pretrial conditions, 29 of them were violated for
25 failure to appear.

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1 In addition, because Mr. Calugaru proposes that his
2 supervision would probably be handled -- and I can't speak on
3 behalf of pretrial services, but -- likely would be handled in
4 conjunction with the Southern District of Florida, the Southern
5 District of Florida's statistics say that apparently --

6 THE COURT: Oh, no. I am not hearing again. The
7 voice just cut off.

8 For what it's worth, Ms. Shellow has been sort of
9 choppy through this call for me. Can you hear me now?

10 THE DEPUTY CLERK: Judge, do you hear me?

11 THE COURT: Ms. Ng, if you can hear me, would you
12 please call back through again on this same line.

13 MS. SHELLOW: Lisa, I can hear you. I can hear the
14 judge.

15 THE DEPUTY CLERK: Okay. Everybody hears me, right?

16 MR. ROTHSCHILD: Yes, Lisa. This is Sam. We can hear
17 you.

18 THE DEPUTY CLERK: Okay.

19 MR. AHMED: Yes, this is Mohammed. I can hear you on
20 this end.

21 THE DEPUTY CLERK: Let me get her back.

22 (Pause)

23 THE COURT: All right. I don't know what is going on,
24 but again, I lost Ms. Shellow in mid-word. She was I think
25 going into Florida pretrial violation statistics.

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1 MS. SHELLLOW: Your Honor, I have a question in light
2 of the technological issues that we are having this afternoon.
3 And I think what I heard your Honor say was that my
4 presentation has been choppy throughout.

5 THE COURT: I hear you, but it's a little bit
6 distorted.

7 MS. SHELLLOW: In light of that, and in light of my
8 reliance on Dr. Venters's affidavit, does it make sense for us
9 to adjourn to another time that is convenient for your Honor
10 and perhaps when there will be fewer technological issues?

11 THE COURT: One can only hope with respect to the
12 technological issues.

13 But would the government like further time to reflect
14 and perhaps make a supplemental submission before we adjourn?
15 I'll see what the government's request is here.

16 MR. ROTHSCHILD: Yes, your Honor. This is Sam
17 Rothschild.

18 We'd defer to the Court on whether an adjournment is
19 appropriate or necessary here. I'm happy to respond to the
20 points that Ms. Shellow has made on the call thus far. I think
21 my presentation would be relatively brief and would rely
22 largely on what's already been said in our submissions, so the
23 government is happy to move forward with this today, if your
24 Honor is so inclined.

25 THE COURT: All right. Let's try again, but I've been

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1 having trouble with the AT&T bridge, or at least my ability to
2 go into it today, and I also have another conference at 4. So
3 if we move this one again, let me just ask Ms. Ng: Ms. Ng,
4 would you be available to resume at 11 tomorrow? I know you
5 have an earlier meeting.

6 THE DEPUTY CLERK: Yes, Judge, I would be able to.

7 THE COURT: All right. So if I start saying I can't
8 hear anybody again and everybody else can hear me, then we'll
9 all adjourn, we'll resume at 11 tomorrow, and we will put in an
10 order giving a security code for tomorrow. Does that time work
11 for everybody else?

12 MR. ROTHSCHILD: That works for the government, your
13 Honor.

14 MS. SHELOW: That works for me, your Honor. This is
15 Ms. Shellow.

16 THE COURT: Pretrial?

17 MR. AHMED: Mohammed Ahmed. It works for pretrial as
18 well.

19 THE COURT: Okay. Thank you so much. So let's keep
20 our --

21 THE DEPUTY CLERK: Judge?

22 THE COURT: Yes.

23 THE DEPUTY CLERK: We can just use the same security
24 code for tomorrow's conference. That's fine.

25 THE COURT: Okay. Fine. So if we need to dial back

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1 in tomorrow at 11, we'll use the same security code, and I
2 won't --

3 THE DEPUTY CLERK: Yes, the same numbers for today.

4 THE COURT: So I won't put in a further order.

5 Ms. Shellow, I have my ears open and my fingers
6 crossed. Please continue.

7 MS. SHELLLOW: Thank you, your Honor.

8 I was in fact starting the failure to appear
9 statistics from the Southern District of Florida. The number
10 of cases -- that is, the number of defendants who are released
11 in that district -- is comparable to the Southern District of
12 New York, approximately. It's 1319 cases, and of those, only
13 two were failures to appear. So I believe that at least as far
14 as pretrial services records of being able to control the
15 defendants who are released and the record of the defendants
16 who in fact are released, it minimizes or is at least a factor
17 that your Honor should consider in determining whether, in
18 these times, in these circumstances, Mr. Hanes is likely to
19 flee.

20 It goes without saying that there is probably no place
21 in the world that Mr. Hanes could go where he would not be at
22 risk of COVID-19. He is at greater risk in a confined
23 community setting like the MDC, and there should be no question
24 of that. If he can be spared the probability of contracting
25 the virus and the possibility that asymptotically he passes

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1 it on to someone else or other people at the MDC, then I would
2 request that your Honor release him on the terms that we have
3 outlined in our original proposal. Access to money has a
4 different meaning when there's nowhere you can go to spend it.
5 Similarly, access to encrypted conversations, when there is no
6 one to have them with, requires a different lens, I would
7 submit.

8 Mr. Hanes would live on a home incarceration basis, or
9 whatever constraints your Honor would impose in terms of his
10 living conditions. He would be quarantined for the first 14
11 days pursuant to the BOP's protocols and, for that matter,
12 consistent with prudent public health practice. He would not
13 be permitted to have access to anyone that he could infect.

14 I struggle because I know that your Honor, when you
15 evaluated our arguments the first time around, was unimpressed
16 with my client's ability to conform his conduct to the law. I
17 submit that this is (a) a different circumstance, and (b) this
18 is a white collar type case; that is to say, as the government
19 recognizes, this is not a case where the defendant is accused
20 of any kind of violent crime. His crime was committed in
21 person, using an ATM machine; that is to say, he physically had
22 to go to a machine, and the government has proffered
23 photographs of a person it claims is my client at those
24 machines. Home incarceration would clearly prevent him from
25 being able to continue any of the criminal conduct with which

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1 he is charged.

2 Similarly, there is no place internationally that he
3 could fly at the moment, and until those kinds of restrictions
4 are lifted, I submit that your Honor should at least
5 temporarily release him from BOP custody so that he has a
6 better chance of staying healthy. BOP will do a better job of
7 protecting those who remain because clearly there are
8 defendants for whom release is wholly inappropriate. And BOP
9 is charged with, and the MDC is charged with, protecting
10 everyone, not only in its custody but on its staff, and to the
11 extent that one less person at MDC makes that job just a little
12 easier, I submit that it makes sense from a public health point
13 of view, it makes sense from the perspective of my client --
14 that is, while he is subject to a potentially lengthy sentence,
15 this is not a capital case. He shouldn't have to face the
16 possibility of dying. And any one of us -- he perhaps more so
17 than others because of his health conditions, me because of my
18 age -- any of us could be struck down and will die from this.
19 This is not a virus to be taken lightly. It kills not only
20 people who are old but people who are young. It kills not only
21 people who are sick but people who were healthy before they
22 contracted it. And if we can do something to prevent his
23 contracting the virus, then I believe that we should do so.
24 And I believe it is possible to fashion a series of conditions
25 that will be sufficient to ensure his return to court when your

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1 Honor orders him to do so, whether that is by telephone or in
2 person.

3 I think that's all I have to say, your Honor.

4 THE COURT: Thank you, Ms. Shellow.

5 Am I correct in understanding then that you are not
6 going to make any further specific proffers as to Mr. Hanes's
7 individual medical condition?

8 MS. SHELLOW: As I stated in my original submission,
9 he has high cholesterol that is documented in his medical
10 records, which were provided to me pursuant to a subpoena and
11 which the government has a copy of. He similarly has been
12 described as prediabetic, and that merely -- as I understand
13 it, that refers to his susceptibility to diabetes; and the high
14 blood pressure, which I believe, but I did not see the original
15 list, so I do not know the criteria that were used to place him
16 on the list originally, but his private physician, I am told,
17 diagnosed both high cholesterol and high blood pressure at the
18 time that he was last seen in Florida. I have been unable to
19 obtain those records because I am unable to obtain a HIPAA
20 release from my client under the pending circumstances. But I
21 have reason to believe that that's what they say as there is a
22 reference in the BOP's records to hypertension and then they
23 say resolved, which suggests that at one point in time it did
24 exist and then it was resolved.

25 THE COURT: I will just note for the record and

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1 thereby share with you all that I have looked at the CDC list
2 of risk factors. That includes what the CDC characterizes as
3 serious heart conditions, a subset of which is pulmonary
4 hypertension, which is, as I understand it, a type of high
5 blood pressure that affects the arteries in the lungs, as a
6 potential aggravating factor for the respiratory symptoms of
7 COVID-19, but in my review, I did not see that high blood
8 pressure in and of itself is a risk factor -- a higher risk
9 factor specifically identified on the CDC list, at least as of
10 last week when I looked at it.

11 And so with that, unless Ms. Shellow wishes to say
12 anything further, I would ask that Mr. Rothschild or one of his
13 colleagues step in now.

14 MR. ROTHSCHILD: Thank you, your Honor. This is
15 Mr. Rothschild. And as I noted, your Honor, I will try to be
16 brief.

17 I'd like to address what Ms. Shellow said that
18 pertains to the relevant factors under the law and that
19 pertains to this defendant in particular, because I believe
20 much of what she said could apply to all prisoners in all jails
21 everywhere, and so I want to focus on the specific facts here.

22 I won't belabor the point that the factors that caused
23 your Honor to conclude that this defendant poses a serious
24 flight risk are all still present today. Prior to today's oral
25 argument, I hadn't understood defense to be contesting that.

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1 Nothing in the submissions alluded to a decreased risk of
2 flight.

3 I do understand Ms. Shellow now to be arguing that in
4 light of COVID, flight is somehow harder. And just to take
5 that up briefly, as your Honor well knows, flight doesn't just
6 mean hopping on an airplane, although I would dispute
7 Ms. Shellow's representation that the defendant would not be
8 able to get on a flight. In fact, my understanding is that
9 citizens of the European Union, which this defendant is, are
10 still free to fly to the European Union, and there are flights
11 available, so that risk is still present.

12 Ms. Shellow said that there's no place where the
13 defendant could go where he'd be free of the risk of COVID-19,
14 and that may well be true. There are, however, lots of places
15 where he could go where he'd be free of the risk of this
16 pending criminal case, and that's why we're here.

17 As far as some of the other factors that Ms. Shellow
18 argued are deserving of less weight now, I submit that there's
19 plenty that this defendant could do with his access to cash,
20 plenty of individuals with whom he could continue to have
21 encrypted conversations, so I don't really understand how the
22 presence of the COVID-19 pandemic really decreases the ability
23 of this defendant to evade law enforcement detection and evade
24 the charges in this case.

25 Turning to the risks that COVID-19 presents to this

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1 particular defendant, your Honor is exactly right. The general
2 high blood pressure is not on the CDC's list of underlying
3 conditions that pose an increased risk, nor are prediabetes or
4 high cholesterol, so none of the three conditions that defense
5 relies upon put this defendant into the category of high-risk
6 individuals with respect to COVID-19. And so the Court can
7 look at the cases that were cited on page 6 of the government's
8 opposition, where courts, including this Court, have denied
9 release for even those defendants who do have more serious
10 versions of some of the conditions that this defendant cites,
11 such as diabetes, as opposed to prediabetes.

12 Ms. Shellow relied on the *Smalls* case, which is cited
13 in our brief, where your Honor denied release, and Ms. Shellow
14 argued that in the 16 days since the *Smalls* case, much has
15 changed. I think of relevance, though, in the 16 days since
16 the *Smalls* case, his three conditions are still not on the
17 CDC's list of high-risk underlying conditions.

18 Similarly, Ms. Shellow invoked Judge Rakoff's
19 decision, the transcript of which we attached to our
20 submission. Again, as we noted in our brief, the important
21 point there is that Judge Rakoff found, among other things,
22 that that defendant did not pose a risk of flight. That
23 defendant had been out pending his guilty plea and had abided
24 by conditions. So clearly that case is not on all fours here.

25 I'm happy to answer any questions that your Honor may

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1 have with respect to the high risk list put out by MDC. I note
2 that defense apparently seems to rely on that list in her
3 arguments, so if your Honor would like, I'd be happy to speak
4 about that list, but otherwise, your Honor, we'd rest on our
5 submission and respectfully request that your Honor deny the
6 motion for reconsideration.

7 THE COURT: Well, there doesn't seem to be particular
8 reliance on the list one way or the other. She had discussed
9 the CDC criteria. If the government is not relying on absence
10 from the list, I don't think I have any further questions for
11 you about that.

12 Do you have any argument for me in terms of
13 contextualizing the argument that I think I hear Ms. Shellow
14 making, at least in a qualified way, that the affidavit that
15 was filed in the Eastern District case shows that the risk in
16 general to all detainees is not what the Bureau of Prisons may
17 be aiming for and is unacceptably high? Although Ms. Shellow
18 does seem to accept the notion that not everyone should be
19 released because of whatever risk level is indicated by this
20 affidavit but that notwithstanding the BOP's five phases, this
21 affidavit should cause me to see differently the general status
22 of BOP's mitigation efforts. So do you have anything to say
23 about that?

24 MR. ROTHSCILD: Thank you, your Honor. This is Sam
25 Rothschild.

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1 Unfortunately, your Honor, I don't have much to say to
2 that. And I've conferred with my two colleagues who are on the
3 line. The three of us were generally aware of the litigation
4 in which that affidavit was apparently filed, but prior to
5 Ms. Shellow's invoking it, none of us has looked at or read
6 that affidavit. However, I will say that to the extent that
7 the kind of argumentative move being done with the affidavit is
8 to kind of cast doubt on BOP or MDC's handling of this crisis
9 generally, I think that the point that your Honor was alluding
10 to is exactly right, which is to say that these applications
11 for pretrial release continue to require individual analysis,
12 you know, defendant by defendant, and there's simply nothing in
13 the defense's submissions here that would distinguish this
14 defendant from any other.

15 THE COURT: Thank you.

16 Officer Ahmed, did you wish to say anything from the
17 perspective of pretrial services?

18 MR. AHMED: Yes, your Honor. Mohammed Ahmed.

19 I would like to point out two general things. One, we
20 continue to believe that there are no conditions or combination
21 of conditions that would reasonably assure the appearance of
22 the defendant.

23 I would like to note that our agency has really gone
24 from being a proactive agency to being more reactive. I would
25 also note that the location monitoring program is primarily

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1 used to address danger, dangerousness to the community and not
2 for risk of flight. There's nothing barring someone from
3 cutting off their ankle monitor and leaving, and in that case,
4 given this pandemic, the reaction of pretrial services is
5 extremely limited.

6 Nothing else. If your Honor has any questions, I'd be
7 happy to answer them.

8 THE COURT: Would I be reasonable in assuming, as to
9 the statistics that have been cited, that persons who have been
10 subjected to monitoring by the Southern District of New York
11 and Southern District of Florida would be people who have been
12 determined by a court, in light of the advice of pretrial
13 services, to pose a low risk of flight in the first place?

14 MR. AHMED: I don't know the exact statistics, but I
15 would agree that it would be more so to address danger and not
16 the risk of flight. Again, our operations are limited, and
17 this program as is, even when we are fully staffed and
18 operational, it's not used to primarily address the risk of
19 flight.

20 I would also note, I don't know what Florida
21 operations are like now, but the last time I spent -- I did a
22 case where we sent someone to Georgia, and at that point, based
23 on people that we were requesting courtesy supervision from New
24 York, they were asking that the people not go to the
25 courthouse, they were asking that they, you know, go to a

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1 residence. And they were not fitting them with location
2 monitoring equipment. They were not having any personal
3 contact with people. And that was a case in, if I recall
4 correctly, the Middle District of Georgia, and I believe that
5 that might be similar to what's going on throughout the country
6 as well.

7 THE COURT: Thank you, Officer Ahmed.

8 MR. AHMED: You're welcome, ma'am.

9 THE COURT: Ms. Shellow, any reply remarks?

10 MS. SHELLOW: Briefly, your Honor.

11 In response to pretrial services, I think it is not
12 possible to generalize from the Northern District of Georgia to
13 the Southern District of Florida. At least in our district,
14 according to Mr. Rothman, if a defendant is being released with
15 home incarceration, they are getting the bracelet either put on
16 the same day or the next morning, depending on when they are
17 released and where they are released from. So at least in this
18 district, we are in fact fitting people with bracelets.

19 As to whether the bracelet's primary function is to
20 deter violence or to deter flight, I would argue that while it
21 may be, in this officer's view, primarily used to address the
22 risk of violence, it certainly operates to address the risk of
23 flight because the rate at which defendants -- defendants can't
24 be released under the law if there is either a risk of danger
25 or a risk of flight, so by virtue of the fact that they are

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1 being released and put on some form of location monitoring,
2 that means that someone has made the assessment that they can
3 conform their conduct to the requirements of the bracelet and
4 that in very few instances do they in fact cut the bracelet
5 off, or otherwise attempt to damage or to evade its
6 surveillance forms.

7 As to reliance on the list created by BOP, I am
8 relying on the first one, on the first list, only insofar as
9 that was the judgment of the Bureau of Prisons that my client
10 was at a particular risk. I do not know how they arrived at
11 that conclusion, but that was in fact the conclusion of the
12 MDC. That is my understanding of what that first list was. I
13 do not have any information, as I said, about the second list,
14 and the significance of his absence from the second list.

15 The government suggested that none of the factors
16 related to risk of flight had been in any way diminished. In
17 point of fact, Mr. Hanes no longer has documents that would
18 allow him to leave the country, and under the present
19 circumstances, if required to be on home incarceration, would
20 not have access to those documents, even if he could find
21 someone who could somehow make them for him.

22 Your Honor has the ability to fashion, should you
23 desire, a condition that would prevent him from using a
24 cellphone and would prevent him from --

25 THE COURT: Pardon me. I could fashion a condition

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1 that would prohibit him from using a cellphone and that would
2 prohibit him from having various forms of contact or
3 association, but one of Officer Ahmed's points was that the
4 ability of a pretrial services department to proactively
5 enforce those prohibitions is limited in normal times, and even
6 more so now, given the general risks even to officers.

7 MS. SHELL: Your Honor, the enforcement of any of
8 the imposed prohibitions primarily would come from the
9 suretors -- that is, those people, his parents, who are not
10 only willing to put up the cash that they were able to have and
11 find, which was a significant hardship, but also whatever
12 earnings they're likely to have. The amount of money the bond
13 suggested is sufficiently onerous that his parents would ensure
14 that my client abides by whatever prohibitions your Honor
15 imposes because his failure to do so would mean that they are
16 in financial ruin. As it is, you know, his father is, as I
17 understand it, working only one or two days a week, and in the
18 construction business in Florida. Even in a family business,
19 he's only working one or two days a week. So I think that
20 that's where the enforcement comes from. And in large measure,
21 in any case where a bond amount is set and financially
22 responsible people agree to forfeit to the United States
23 government a sum certain if the defendant does not adhere to
24 the prohibitions of the Court, that's the *in terrorem* effect
25 that pretrial services, at least at the moment -- or I can't

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1 speak to its ordinary operations, but at the moment is unable
2 to provide the sufficient attention to that it would like.

3 THE COURT: And a package with suretors was offered on
4 the initial bail application, correct?

5 MS. SHELLOW: That is correct, and it is offered
6 again.

7 THE COURT: Thank you.

8 I have considered carefully the submissions in advance
9 of this hearing, and I've listened carefully to everything that
10 has been said today, and as I noted, I am familiar with the
11 affidavit or affirmation to which Ms. Shellow referred when she
12 was making arguments regarding conditions at the MDC and the
13 ability of the Bureau of Prisons in general and the MDC in
14 particular to mitigate the risks of COVID-19 contagion.

15 Insofar as this is an application to reopen the
16 earlier bail hearing, Section 3142(f) of Title 18 permits the
17 Court to reopen a bail hearing if the defendant demonstrates
18 that there are new facts that are material to the determination
19 that are the focus of the bail statute -- risk of flight and
20 danger to the community. Here, risk of flight is the key
21 consideration.

22 Mr. Hanes proffers that the COVID-19 pandemic is a
23 fact that was not known at the time of his bail hearing and
24 argues that because of the worldwide pandemic, there is no
25 place in the world that he could or would flee if released

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1 because he would not be safe from a potentially lethal
2 infection anywhere other than in the home of his parents. And
3 Mr. Hanes also makes arguments as to conditions at the MDC.

4 And so the fact of the COVID-19 pandemic and that the
5 MDC is responding to it in various ways are certainly true for
6 every detainee at the MDC.

7 The argument that the combination of Mr. Hanes's
8 medical condition, which includes certain conditions that are
9 not CDC-recognized risk factors in and of themselves but are
10 diagnosed medical conditions, the combination of those and the
11 pandemic, he argues, creates a fear of infection that is
12 sufficient to ensure that he remains in the home to which the
13 Court could order him confined. That argument relies on a
14 nexus between the generalized COVID-19 pandemic and Mr. Hanes
15 Calugaru's detention and ability to be guided by his parents'
16 moral suasion insofar as his parents continue to be the
17 proposed guarantors. The Court finds that nexus insufficient
18 to have a material bearing on the Court's risk of flight
19 determination. A defendant's own evaluation of his character
20 is not new information for purposes of reopening a bail
21 hearing. See *United States v. Esposito*, 354 F.Supp.3d 354, 361
22 (S.D.N.Y. 2019). The facts relied on of the general contagion
23 or general risk of contagion of the world are facts, but as to
24 his character and his reaction to the change of circumstances
25 as reasons he would choose to abide by conditions of release

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1 rather than flee and avoid trial and the health risks of
2 continued confinement altogether are just that, assessments,
3 and too speculative to rise to the level of fact as to his
4 behavior.

5 Accordingly, the Court finds that Mr. Hanes has not
6 offered any facts that are material to the Court's assessment
7 of the specific risk of flight that he poses and the
8 application is denied insofar as it seeks reopening of the bail
9 hearing.

10 Mr. Hanes Calugaru also moves pursuant to
11 Section 3142(i) of Title 18 for temporary release during the
12 public health emergency. 3142(i) empowers the Court to permit
13 the temporary release of a detainee to the extent that the
14 Court determines such release to be necessary for the
15 preparation of the person's defense or for another compelling
16 reason, and as Ms. Shellow has noted, I have recognized that
17 release may be necessary to protect certain defendants with
18 underlying conditions that may render them especially
19 vulnerable to COVID-19, high risks of either contracting the
20 disease or suffering severe manifestations of the disease. The
21 health conditions that have been cited by Mr. Hanes are not
22 ones that place him in the high risk category defined by the
23 CDC, and at age 40, he is not in an age-related high risk
24 category. Defendants who have been released temporarily in
25 this district on health grounds have had serious respiratory

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1 conditions or diseases that specifically put them at an
2 elevated risk of infection or the development of complications
3 if infected. The health-related risk is evaluated on an
4 individual-by-individual basis, and the Court finds that
5 Mr. Hanes has proffered insufficient information to persuade
6 the Court that he is personally at greater risk as an
7 individual than members of the detainee population of the MDC
8 in general.

9 The BOP has implemented policies and consulted with
10 various experts to develop and implement strategies that are
11 intended to mitigate the risks posed by COVID-19 insofar as
12 possible in the context of the Bureau of Prisons facilities,
13 resources, and mission. Those mitigation measures do not and
14 cannot eliminate the risk of COVID-19 but they are calculated,
15 as I have indicated in earlier decisions, and reiterate here,
16 to mitigate the risk of infection in the inherently close
17 quarters of the facility, for all persons in custody and for
18 Bureau of Prisons staff, and the risks that are faced by any
19 particular individual by reason of crowding and other
20 conditions has to be balanced against, in Mr. Hanes's case, the
21 risk of flight that he poses.

22 The information that has been proffered in connection
23 with the ongoing litigation regarding the sufficiency of the
24 MDC's measures is not sufficient to show a compelling
25 particularized personal risk enhancement or a generally

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1 heightened risk sufficient to overcome the needs that I have
2 previously found to detain Mr. Hanes to protect against the
3 risk that he will flee and not face the serious charges that
4 have been lodged against him. I find that the risk of flight
5 cannot reasonably be managed by temporary pretrial release
6 conditions, particularly during the public health crisis, when
7 supervision and policing resources are strained.

8 Accordingly, I find that there is no compelling reason
9 on health grounds for temporary release, and the application
10 pursuant to Sections 3142(f) and 3142(i) is denied.

11 The Court will enter an order stating that the
12 application is denied for the reasons stated on the record.

13 Counsel, I thank you for your arguments and your
14 submissions. Is there anything further that we should take up
15 together this afternoon?

16 MR. ROTHSCHILD: This is Sam Rothschild. Nothing from
17 the government, your Honor.

18 THE COURT: Ms. Shellow, are you still there?

19 Oh, no. Ms. Shellow?

20 Ms. Ng, are you still there?

21 THE DEPUTY CLERK: Yes, I'm still here.

22 THE COURT: And is Ms. Shellow's line still showing as
23 live?

24 THE DEPUTY CLERK: Give me one second.

25 Yes, it's still showing that there's nine people on.

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1 The thing is that her number is an unlisted number.

2 Oh, here she is.

3 THE COURT: Ms. Shellow?

4 She just dropped off?

5 THE DEPUTY CLERK: Yes, she just dropped off. She'll
6 come back on, I'm hoping.

7 THE COURT: All right. Let's wait a couple of minutes
8 for her to come back on. I have a 4:00, so we are going to
9 need to switch over to another telephone conference shortly.
10 And I will be filing an order.

11 Let's wait another minute and see if she dials back
12 in.

13 (Pause)

14 THE COURT: Ms. Ng, you don't see any sign of her
15 dialing in?

16 THE DEPUTY CLERK: No, not at all.

17 Oh, wait. No, that's someone calling me about the
18 other conference.

19 THE COURT: Okay. Well, this transcript is complete.
20 I will include in the order that I file a request that
21 Ms. Shellow explain this hearing to Mr. Hanes Calugaru and
22 provide him with a copy of the transcript.

23 Did someone just come back on?

24 MS. SHELLOW: Yes. This is Ms. Shellow. I apparently
25 disappeared for a moment. I'm back.

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1 THE COURT: I don't know. The AT&T poltergeists are
2 working overtime today.

3 Did you hear me address 3142(i)?

4 MS. SHELLLOW: Yes, I did, your Honor.

5 THE COURT: And so the conclusion that I reached is
6 that the application is denied both as to 3142(f) and 3142(i).

7 I'm going to enter an order stating that the
8 application is denied for the reasons stated on the record, and
9 I would ask that you describe this hearing and the results to
10 Mr. Hanes and provide him with a copy of the transcript, and I
11 authorize translation of the transcript if that is necessary to
12 give him access to the information.

13 MS. SHELLLOW: Thank you, your Honor.

14 THE COURT: Thank you.

15 And I thanked counsel and I thank you for your
16 advocacy and for your submissions.

17 Is there anything further that we need to take up this
18 afternoon, Ms. Shellow?

19 MS. SHELLLOW: No, there's not. Thank you, your Honor.

20 THE COURT: And Mr. Rothschild, you said that there's
21 nothing from the government's perspective?

22 MR. ROTHSCHILD: This is Sam Rothschild. That's
23 correct, your Honor.

24 THE COURT: Thank you. Then we are adjourned. Stay
25 safe and keep well, everyone. Thank you.

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1 MS. SHELLLOW: Likewise, your Honor. Stay safe.

2 MR. ROTHSCHILD: Thank you, your Honor. Bye-bye.

3 MR. AHMED: Thank you, your Honor.

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